

STATE OF MICHIGAN  
IN THE SUPREME COURT

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Appeal from the Court of Appeals  
Kathleen Jansen, P.J., and Stephen L. Borrello and Cynthia D. Stephens, J.J.

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant

VS

RAMON LEE BRYANT,

Defendant-Appellee

Supreme Court  
No. 141741

Court of Appeals  
No. 280073

Kent County Circuit  
Court No. 01-08625-FC

**DEFENDANT-APPELLEE'S BRIEF ON APPEAL**

**ORAL ARGUMENT REQUESTED**

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STATEMENT OF JURISDICTION

Appellee accepts Appellant's Statement of Jurisdiction

COUNTER-STATEMENT OF QUESTIONS INVOLVED

WAS THE COURT OF APPEALS CORRECT IN HOLDING THAT MR.BRYANT  
WAS DEPRIVED OF HIS AMENDMENT VI RIGHT TO A JURY  
COMPOSED OF A FAIR CROSS-SECTION OF THE COMMUNITY?

The trial court answers this question "No".  
The Court of Appeals answers this question "Yes".  
Appellee answers this question "Yes".  
Appellant answers this question "No".

## COUNTERSTATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Mr. Bryant's trial commenced January 29, 2002. (5a) [All page citations throughout are from Appellant's appendix.]

Prior to trial, counsel challenged the array; as a consequence of which Gail Van Timmeren, the County Jury Clerk (58a , p. 30) testified, explaining the random process for choosing jurors from the entire pool on a daily basis. (51a, p.35) The pool comes from those who have a valid driver's license or valid state identification and who are over 18. (50a , p. 30) Of the 45 names selected for the current case, of 132 selected for the day, (15a) a visual survey indicated 1 minority person was finally selected out of 2 (29a) on the panel. (16a)

A "Jury Community Representation Survey Compilation (Voluntary Participation)" was admitted into evidence showing African-Americans to be approximately 8.9 % of the county population. Two Afro-Americans would be 1%. Similar percentages were presented for January weeks. Counsel argued that this was not fair or representative. (29a) The Prosecutor acknowledged that Kent County has a problem (30a) but part of the problem is lack of voluntary participation. The Court denied the motion, principally for that reason, holding that the system is race neutral, good faith efforts are made to include minorities and there is no effort to exclude them. (33a) [This is discussed further under Answers to Question Propounded by the Court, Answer 3]

At a subsequent evidentiary hearing, pursuant to remand, Terry Holtrop, Kent County Case Management Supervisor, said that it had been brought to his attention that there was an under-representation in 2001. He described it as an information technology situation. (45a , p.10) He acknowledged that the law provides for a contempt citation for failure to return the jury

questionnaire but the board had never done that. (47a) When a letter to a prospective juror was returned as undeliverable, nothing was done. (20) He acknowledged that there was an underrepresentation at the time in 2001 and 2002. (45a , p.10)

Gail VanTimmeren said that orders to show cause had been issued for failure to respond but no follow-up occurred. (48a, p. 24) ; confirmed by Terry Holtrop. (47a, p. 19) She testified:

\*\*\*\*\*

A. Well, if the fact that you have random selection, from top to bottom, and those random jurors are in the pool and these are minorities that you visually can tell that they are minorities, you probably could hand select those minorities to go in.

Q. And is that, in fact -- or was that, in fact, done at that time?

A. Yes, on a number of occasions, that was done.

Q. How was it done? I mean, what was the procedure?

A. The procedure was that I just went through the jury pool and selected people, just on a visual basis of ethnicity, to be selected for a particular panel to go into the courtroom.

Q. Doesn't that do violence to the random sampling that's (50a, p. 29) required.

A. Well, they're all in there randomly anyway.

Q. So, you took it upon yourself --

I'm not saying --

A. Right.

Q. But you took it upon yourself to fill up a minority quota on a jury? Is that what you're saying?

A. I took it upon myself to put minorities on a panel.

Q. I see. And if you were out with a cold that day, it wouldn't happen?

A. Probably not.

\*\*\* (50a, p.30)

Q. ...now you said you sometimes would go through the jury pool and select people who appeared to be minorities for particular cases? You mentioned that in your testimony.

A. Yes.

Q. When would you have occasion to do that? Why would you do that?

A. Because there were cases with ethnic defendants and there was no one ethnic in the jury pool at all.

Q. Was that something that you did on your own?

A. Yes.

Q. All right, ordinarily what would you do?

A. Ordinarily, you would just randomly select.

Q. So you would randomly select from whatever this group is --

A. Right

Q. --however many people, and you would say, all right, this random group, I'll pick out 45 names, for example, to go into a particular venire to be selected for a particular case?

A. Right. They are already randomly selected from top to bottom until they get in there anyway.\*\*\*(50a , pgs. 29,30) (Emphasis supplied.)

When asked what did she do about the low minority representation, she said:

“Well, I did everything that a little jury clerk can do. I mean, I’m a peon. I brought up the fact that we had no jurors. I kept telling the story about the fact that we had two black co-defendants and not one black or minority member on—within 50 jurors, and that we significantly, in every single week, were not getting minorities in, and there was something wrong.” (51a , p. 33)

From her visual observation she thought there was 1 African-American among the 45 jurors on the venire for Appellee’s trial. (51a , p. 36)

Other fact will be presented where appropriate.

#### SUMMARY OF ARGUMENT

The Court of Appeals’ decision of July 20, 2010 reversing the trial court should be affirmed because: Mr. Bryant has established a prima facie violation of his fair cross-section entitlement which has not been successfully rebutted by the prosecution. The evidence demonstrates either a purposeful discrimination or an unintentional discrimination. Mr. Bryant has shown that he is a member of a distinct group, is entitled to fair and reasonable representation in relation to the group’s population and that systematic exclusion was perpetrated both in law and in fact.

In answer to the Court’s questions, this Court should examine only the composition of Defendant’s particular jury; statistical estimates are permissible and militated in Defendant’s favor and lack of fair and reasonable representation was, in his case, the result of systematic exclusion.

A distillation of the evidence concludes that the venire was composed of 1 out of 45 African Americans from the jury pool, that Appellee’s expert demonstrated under-representation and Appellant’s expert, Professor Stephenson, with the trenchant comment that this could not have come about by chance, confirmed it.

It appears from the Professor's testimony that there is insufficient information to draw a conclusion, and what we have is unreliable, but he concluded nevertheless that the procedure was biased even if he cannot say it was deliberate and then opined that it didn't matter since it would have happened in any event.

## ARGUMENT

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT MR. BRYANT WAS DEPRIVED OF HIS AMENDMENT VI RIGHT TO A JURY COMPOSED OF A FAIR CROSS-SECTION OF THE COMMUNITY.

*Counterstatement of Standard of Review:* Questions of systematic exclusion of minorities from jury venires are reviewed de novo. *People v Hubbard* (After Remand), 217 Mich App 459, 472 552 NW2d 493(1996); *People v Williams*, 241 Mich App 519;616 NW2d 710 (2000).

A defendant is entitled to relief from a preserved constitutional error unless that error was harmless beyond a reasonable doubt. Once a prima facie case has been made, the burden of proof lies with the prosecution. *Chapman v California*, 386 US 18, 87 S Ct 824, 17 L Ed 2d 705 (1967), *People v Anderson* (After Remand), 446 Mich 392; 521 NW2d 538 (1994), *People v Smith*, 463 Mich 199, 205, 615 NW2d 1(1979) (*Smith* gave defendant the benefit of the doubt. Id, at 205; 615 NW2d at 3.)

A defendant in a criminal trial has a constitutional right to a jury drawn from a venire representative of a fair cross-section of the community in which the case is tried. US Const Amends. VI, XIV; *Taylor v Louisiana*, 419 US 522, 527, 95 S Ct 692, 42 L Ed2d 690 (1975); *Duren and People v Hubbard*.

*Appellee's witness, Dr. Chidi Anyanwu Chidi:*

He had taught statistics for years. (64a , p. 8; 72a , p. 37)) He did not agree that because

the venire contained at least 1 African-American juror there is insufficient evidence to conclude that the venire was significantly biased. (95a 37) He discussed the absolute disparity test: Only 1 African-American juror was observed of the 45 people who served on that jury. The expected value would be that number multiplied by the percentage of African-Americans within Kent County, which would have resulted in 4 African-American jurors. Since only 1 African-American juror was present the absolute difference is 3 which multiplied by 100 is 300%, far in excess of the 11.5% allowed by the courts as reasonable representation. (95a p. 38) It's not a question of the small number of African-Americans within the Kent County area: "It is the number that is presented within the day of the judgment that appear." "We should have had at least four African-American jurors within that--that day of the jury". (95a p. 39) By the Comparative disparity we get 75% but the courts allow 40%. So this also fails this test. The Standard Deviation Test gives us a 7% difference which is not applicable since the probability supporting the hypothesis is too low. The number has also failed the Goodness of Fit test. (Referring to his report)

He noted that Page 5 of Professor's Stephenson's report indicates that there is essentially no chance of acquiring the results we obtain if the selection process for jurors is unbiased. "As a result, there is overwhelming evidence to conclude that the selection process for terms during the first months of 2002 was biased." "That bias favors the Whites and disfavors the African-Americans. It's biased." (96a, p. 42)

He responded to the statement that it wouldn't have made any difference by stating if it was unbiased then we would expect at least four African-American jurors that particular day, which is what is meant by expected value. Because it was biased we had only one African-American juror. Because the number of people who appeared was 45 multiplied by the proportion of African-Americans within the community, which was 8.25% would have given you 4 which is

where the argument hinges. (96a, p. 43)

In answer to a question from the Court, he said that if the system was unbiased the probability of at least one would be “.10 I think 107”. (98a, p. 51) Every venire selected would contain at least 8.25% of the population. It should never have less than four. That’s the expected value. (99a p. 54) Since one was observed, the disparity is three, 300%. (99a, p. 55)

*Appellant’s witness, Dr. Paul Stephenson:*

He assumed that bias was not present and then looked for corroborating evidence. (94a, p. 33) The absolute disparity and comparative disparity tests are not viable because of the small numbers (87a, p. 8, 88a, p. 9) He replaced the Standard Deviation Test with a Binomial Test which assumes the venire is unbiased and examines whether there is sufficient evidence to conclude the opposite. The long-run proportion of selected jurors who are African-American is 8 ½ %. (Census) (88a, p 10) The conclusion is that there is insufficient evidence to demonstrate that the representation of African-Americans was biased, due in part to the small size of the venire. (88a, p 11) The information collected regarding the ethnicity of the individuals from the jury survey is unreliable. (88a, p. 12) Under the Chi-Square Goodness-of-Fit test prospective jurors are selected randomly across all zip codes versus the alternative that they were not selected randomly across all zip codes. (89a, p. 13) There is essentially no chance of acquiring the result that was obtained if the selection process for potential jurors was unbiased. He confirmed the fact that there was some type of computer error that caused the process, the jury-pool selection process, to be biased. (89a, p. 15) (Acknowledged in Appellant’s brief. p 6 The error in computer programming was not cured until August of 2002. (110a, para. 24)) [Mr. Bryant’s trial commenced January 29, 2002. (5a)] In certain ZIP codes African-Americans were under-represented and in others over-represented. Consequently, the jury selection process was not representative across all ZIP codes.

(89a, p. 16) "Now this is where it can potentially creep into a problem with regards to ethnicity."

(89a, p. 16) Where African-Americans are over-represented, there was a small number of African-Americans and for the ones that were under-represented there were a large number of African-Americans. ZIP codes 49503, 49506, 49507 and 48950 contain the vast majority of African-Americans in the Kent County area. With one exception, they are all under-represented. If the selection process had been random, "and if everything had been working correct", (90a, p. 18) across all ZIP codes, 8 ½ percent of the individuals summoned would have been African-American. (90a, p. 17) Actually, in his opinion, as a guess, only 4.17% were African-American. (90a, p. 18) There were 45 individuals in the venire. If everything is working correctly, of the 45 individuals randomly selected you would have a 2% chance of getting no African-Americans and an 8 ½ percent chance of getting one. The most probable outcome was to get 3 African-Americans if everything was working correctly in the venire. (90a, p. 19) The probability of having no African-Americans is 14.75% where it should have been 2%. In other words obtaining the venire that was obtained was essentially 4 times more likely during this period of time, assuming that the jurors were summoned appropriately. (90a, p. 20)

A graphic display demonstrated that the likelihood of getting 1 or 2 African-Americans in the venire is more likely than it should have been. The way the process was performing over the long run created a situation where African-Americans were going to be under-represented although in this particular venire for this particular court case there was insufficient evidence to demonstrate that the venire was systematically under-represented.

He responded in the affirmative to a question from the Court (91a, p.21) that the jury selection in the instant case would have happened even if everything had been done correctly. (91a, p.21) If everything had gone right, there was a one in ten chance we would have ended up

exactly where we were. (91a, p. 22, 94a, p. 36)

“The conclusion is that the likelihood of having 0,1,or 2 black or African-Americans in a venire is more likely than it should have been. The likelihood of having 3,4,5,6,7,8,9, up to 12 is less likely than it should have been.”

The likelihood that there would be no African-Americans on the jury is about 14.7%. (93a, p. 31)

“Given the amount of bias that was present in this particular jury selection process, 45 was not enough to (93a, p. 32) identify that difference, given that one African-American was in that jury pool.” (94a, p. 33)

He acknowledged that 73% fewer African-Americans were in the venire than he would have anticipated. If the selection was unbiased he could expect 1 to 7 African-Americans on the venire. (94a, p. 33) Over the long-run, approximately 8.25 jurors would be African-American if the selection process had been random. Even if performing correctly, 2 out of every 100 would have no African-Americans which means that at a minimum, there’s at least reason to suspect that there would be a bias. (94a, p. 34)

“Yes. There’s evidence to support the fact that the selection process for potential jurors was biased. And—and that p-value is so small, there’s really no question on that. I mean, that’s so incredibly unlikely to have gotten that distribution of jurors.” (94a, p. 35)

Had the selection process been random 8.25% would be African-American over the long run. (Id. 94a, p. 35)

*Discussion of Judge Kolenda’s opinion:*

Judge Kolenda rejected Appellee’s expert as biased or lacked understanding of statistics. (113a. para 27) Appellee suggests that rejection of his expert’s opinion out of hand is error. If a difference of opinion held by a *judge* is not biased. *People v Wells*, 238 Mich App 383; 605 NW2 374 (1999) why should the difference of opinion by experts be treated differently?

Judge Kolenda noted that 293 individuals were summoned for jury duty during the week of

Appellee's trial. Of the persons who appeared one person looked to be African-American(107a, para. 10) The Court noted that 8.25% of Kent County jury eligible population was African-American.(He also noted that this was an overstatement.) (108a, fn. 5) Appellee submits that this Court need go no further since one African-American on the venire in a county of 8.25% African Americans should, perforce, determine the issue. A survey of prospective jurors who responded to their summonses since 2002 identified themselves as 6.6% African-American. (109a, para. 20) Ironically, the Judge noted, all 132 jurors who appeared on January 28, 2002, responded to the survey; one identified himself or herself as African-American and one identified himself or herself as multi-racial. (110a) The error in computer programing was not cured until August of 2002. (110a) As note above, Mr. Bryant's trial commenced January 29, 2002. (5a)

Appellee's expert's analysis of the difference between, as he stated, 2.2% and 8.25% being the result of chance and then "He concluded that the small number of jurors who identified themselves as African-American can be explained only by their systematic exclusion." (111a, para 28)

The Judge said that Professor Stephenson was credible and persuasive but Appellee's expert created an unfavorable impression. (113a, para. 37) Perhaps Judge Kolenda was influenced by his feeling that finding a fair cross-section violation "opens the door to wholesale reversals of criminal convictions and, perhaps, to civil verdicts, as well." (122a, fn. 16)

Judge Kolenda noted that Professor Stephenson opined that in a correct procedure there should be 13 African-Americans in each week's pool and that an exactly proportional weekly pool would have included 25 African-Americans. (112a, para. 32)) Although the actual number would have been less because of undeliverable questionnaires, etc. (Id., para 33) Professor Stephenson surmised that in that conclusion there is an estimate which reflects what actually happened in

January-March 2002. “a systematic bias did exist then, in the selection of individuals summoned for jury duty” and this led to the under-representation’ of African-Americans in those months’ jury pools. “If his estimates were accurate, the disparity between 8.25% of all prospective jurors and the estimated fewer number of African-Americans mailed questionnaires was too great, he concluded, to be the product of chance, leaving bias as the explanation.” (112a, para. 34)

After a discussion of the applicable law, Judge Kolenda concluded that Appellee had cleared the first *Duran* hurdle but did not prove systematic exclusion because his evidence was speculative. (116a) Judge Kolenda acknowledged that *People v Hubbard* (aft rem) 217 Mich App 459,552 NW2d 493 (1996), lv den 454 Mich 889 (1997) is a case where the Court deduced an Amendment VI violation solely from statistical estimates as sufficient proof of under-representation (119a ) and that *Int. Brotherhood of Teamsters v US*, 431 US 324, 97 S Ct. 1843, 52 L. Ed 2d 396 (1977) implies the same. The Judge went on to say that, “Statistical estimates are of limited value because they never prove that anything particular actually happened at any particular time.” (122a)

What cannot be ignored is the bad eminence Kent County has achieved in this area. (Acknowledged by the Judge throughout his opinion. (107a, para. 9; Id, 108a; para 11; Id. para. 12 ; Id para.14; Id. para15<sup>1</sup>; 110a, para 22.)<sup>2</sup> Appellant characterizes this thusly: “There was to be sure a “perceived problem in the number of African-American jurors in Kent County venires”. (Br. p. 24) It is this “perceived problem” which deprived Mr. Bryant of a fair trial.

*Legal Argument:*

In order to establish a prima facie violation of the fair-cross-section requirement,

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<sup>1</sup>The Judge noted that it took a high school government class to determine this disproportion.

<sup>2</sup>Apparently the problem continues to persist in the 10<sup>th</sup> Circuit. See *People v McKinney*, 258 Mich App 157 (2003) and *Parks v Warren*, \_\_\_ F Supp 2d \_\_\_ (ED Mich, Feb. 29, 2011).

Appellee must show:

"(1) that the group alleged to be excluded is a distinctive group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to systematic exclusion of the group in the jury-selection process."

*Duren v Missouri*, 439 US 357, 364 99 S Ct. 664, 58 L Ed2d 579 (1979)

While the equal protection clause of the Fourteenth Amendment prohibits under-representation of minorities in juries by reason of intentional discrimination, *Alston v Manson*, 791 F2d 255, 257 (CA 2, 1986), . "the Sixth Amendment is stricter because it forbids any substantial under-representation of minorities, regardless of . . . motive." *United States v Gelb*, 881 F2d 1155, 1161 (CA 2, 1989).<sup>3</sup>

The comparative disparity test:

"measures the diminished likelihood that members of an under represented group, when compared to the population as a whole, will be called for jury service." *Ramseur v Beyer*, 983 F2d 1215, 1231-1232 (CA 3,1992). "Comparative disparity is calculated by dividing the absolute disparity by the population figure for a population group." (Id. 1231) However, "most courts have rejected the comparative disparity analysis because when the distinctive group's population is small, a small change in the jury pool distorts the proportional representation." *People v Smith*, 463 Mich 199, 615 NW2d 1 (2000)at 204.

The absolute disparity test:

"measures representativeness by the difference between the percentage of a certain population group eligible for jury duty and the percentage of that group who actually appear in the venire. The absolute disparity is obtained by subtracting the jury representation percentage from the community percentage. Under this test, absolute disparities between 2 percent and 11.2 percent are considered statistically insignificant and do not constitute substantial under representation." *Bryant*, (36a quoting from *Hubbard*, supra, 475.) [This test was endorsed by *Parks v Warren*, supra, fn. 2]

"The relevant statistic is the percentage of African-American adults over 18 years of age and eligible to serve as jurors. According to the 1990 census 8.1% of Kent

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<sup>3</sup>When counsel objected as irrelevant that a question to Mr. Bentley whether or not the Kent County glitch in jury selection was deliberately caused; an objection was made because "whether it was done deliberately or not. It's the result that counts"; the Prosecutor replied "I don't disagree with that entirely, Your Honor." (59a, p. 25)

County's population is African-American though the African-American adults between the ages of 18 and 69 comprise 7.28% of the county's population. *Smith* at 211 At the jury array hearing, evidence was introduced that of the 183 jurors summoned to circuit court on January 28, 2002, 151 responded and 132 jurors that actually appeared. Of the 132 jurors that actually appeared, 45 jurors were selected for the venire. A visual survey indicated that one of the jurors was African-American, or 22.2%. Therefore, the absolute disparity in the instant case was 5.8% (7.28% -2.2%) As such, this percentage does not constitute substantial under-representation under this test for sixth amendment fair cross-section purposes." *Bryant*, (36a)

But:

"the evidence indicates that the disparity in this case quite possibly resulted from a lack of random selection. Thus, we assume for the moment that defendant has satisfied the second prong of the *Duren* test." *Bryant*, (37a)

The Court went on to say that under *Duren* Defendant must show that "the under-representation of a distinctive group is due to systematic exclusion, i.e, an exclusion resulting from some circumstances inherent in the particular jury selection process used." The court said that Defendant did not present any evidence demonstrating a systematic exclusion of African-Americans from the Kent County Circuit Court jury pool.

"But plaintiff concedes 'there was indeed a problem in the jury selection process in Kent County which occurred from late 2001 to July 2002.'" *Bryant*, (37a) See also *Gelb*, *supra*.

On a percentage basis, at least 4 of the 45 jurors in the array should have been African-American according to Dr. Chiti. Professor Stephenson opined that, "The most probable outcome was to get three black or African-Americans if everything was working correctly in the venire." (90a, p.19) Although Appellee made a factually valid challenge, he is not required to prove intentional discrimination, because even unintentional disparate impact violates the equal protection clause of the Michigan Constitution. He, therefore, need only show that the actions have a disparate effect on him or other Afro-American citizens. It is plainly evident that the Michigan

Constitution goes beyond the limits of the Fourteenth Amendment equal protection of the United States Constitution by prohibiting all racial discrimination, without regard to whether or not there was an intent to discriminate. <sup>4</sup> *NAACP v Dearborn*, 173 Mich App 602 , 434 NW2 444(1988); *Barry v School District of the City of Benton Harbor*, 467 Fed Supp 721, 730 (1978).

"At jury selection, the government used two peremptory challenges to strike two African-Americans from the venire panel.

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The trial court, in denying defendant Harris' *Batson* challenge, noted that one African-American had been seated on the jury. *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986)

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We note that the presence of one African-American on the jury does not preclude a *Batson* challenge....

\*\*\*"

#### DISTINCTIVE GROUP.

Afro-Americans are clearly recognized as a "distinctive group", (*People v Smith, supra*) and as such may not be systematically excluded from the jury selection process. *People v Eccles*, 260 Mich App 379, 677 NW 2d 76 (2001) app dn. 471 Mich 867, 683 NW 2d 672. That Appellee is a distinctive group is acknowledged by Appellant. (Br. p. 16 )

#### FAIR AND REASONABLE REPRESENTATION IN RELATION TO THE GROUP'S POPULATION.

"To satisfy the second prong of the *Duren* analysis, defendant must show that 'the number of members of the cognizable group is not fair and reasonable in relation to the number of members in the relevant community.' (Id. at 473-474) 'Explained another way, the second prong is satisfied where

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<sup>4</sup>Const 1963, art 1, §2

Equal protection; discrimination

No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin...

it has been shown that a distinctive group is substantially under-represented in the jury pool.’ (Id. 473-474) Unfortunately, as our Supreme Court noted in *Smith*, 203, "the United States Supreme Court has not specified the preferred method of measuring whether representation of a distinctive group in the jury pool is fair and reasonable," and that since *Duren* ‘the lower federal courts have applied three different methods of measuring fair and reasonable representation, known as the absolute disparity test, the comparative disparity test, and the standard deviation test.’ The *Smith* Court decided that all three approaches should be considered when measuring whether representation was fair and reasonable, and concluded that "no individual method should be used exclusive of the others," adopting a case-by-case approach. *Smith, supra* at 203.” (*People v Bryant*, (2004) (35a)

Another similar case, this one decided by a Michigan court on Sixth Amendment fair cross-section grounds is the case of *People v Guy*, 121 Mich App 592, 329 NW2d 435 (1982). In *Guy*, at a hearing challenging the jury array, the defendant placed into evidence 4 maps of the greater Battle Creek area showing the location of the residences of jurors on the panels summoned to the defendant's trial and previously postponed trial. They showed only 4 persons from a northeast Battle Creek community that had a heavy concentration of the Afro-American population.

The trial court found that such an area was under-represented on the jury panels when considering the proportion of the total county population living in such an area.

While the Court of Appeals found that Mr. Guy did not satisfy the third prong of the *Duren* test (that the problem was systematic), the Court did find that the defendant had satisfied the other prongs of the test -- that he had identified a distinctive group, and that its representation in jury arrays was not "fair and reasonable":

“The first requirement is obviously met, and the trial court's finding of under representation of the Battle Creek area on the panels, coupled with the trial court's taking of judicial notice that such area contained a heavy concentration of Black population, would appear to satisfy the second requirement. The trial court found that the under-representation of Afro-Americans on the

panels was not due to systematic exclusion in the jury selection process; and thus the third requirement is not met.” 121 Mich App, at 599.

It is submitted that what occurred in the present case is similar to what occurred in *Guy* and should similarly satisfy the second prong of *Duren*. *Hubbard* said the second prong of *Duren* is satisfied where it is shown that a distinctive group is substantially under-represented in the jury pool.

In the case of *In Re Rhymes*, 170 Cal App 3d 1100; 217 Cal Rptr 439 (1985), the California Court of Appeals affirmed the granting of habeas corpus on the ground that the defendant was denied her constitutional right to a jury composed of fair representative cross-section of the community. The defendant objected at trial to under-representation of black persons in the pool of jurors. Out of a pool of 30 jurors from which to draw jurors for her trial, 2 were black. An evidentiary hearing established that the absolute disparity between the percentage of blacks in the county and the percentage on jury panels for part of the relevant year was 4.6%, and that it was a chronic problem. The Court held this violated *Duren*:

"In *Rabinowitz v United States*, *supra*, 366 F2d 34, 58,(1966)(the court stated: 'If a fair cross-section is consistently lacking, then, without more, it is established that the commissioners have failed in their duty. As a consequence, constitutional attack on jury composition may be supported by statistics which demonstrate discriminatory result rather than discretionary design.

“The statistical disparity that the evidence shows in the case raises a presumption of discrimination. Once that presumption has been established, the government cannot dispel it by a mere showing that it has been even-handed in the compilation of the source list. It is not a question of whether there was discrimination, overt or latent, in the selection or composition process, but rather, whether the government has an adequate justification -- a compelling interest -- for the particular process used when that process results in under representation of specific special ethnic groups.”, (Id. at 1112) , emphasis added.

SYSTEMATIC EXCLUSION .

Systematic exclusion is discussed below under Appellee's answer to the 3<sup>rd</sup> question propounded by this Court, to which the attention of the Court is respectfully drawn.

*Further Specific Response to Appellant's Brief:*

The implication that employing the comparative disparity test, as the most appropriate is contrary to *People v Smith*, (2000), *supra*, is inaccurate. The entire sentence in that Court's opinion is:

"We thus consider all these approaches to measuring whether representation was fair and reasonable, and conclude that no individual method should be used exclusive of the others. Accordingly, we adopt a case-by-case approach. Provided that the parties proffer sufficient evidence courts should consider the results of all the tests in determining whether representation was fair and reasonable." 463 Mich 204

The case at bar reflects the case-by-case approach, which the Court of Appeals believed the most appropriate here. (134a) The question is not whether any test should be employed to the exclusion of the others, but rather whether the jury procedure in Kent County comports with the Constitution and, more to the point, whether Mr. Bryant's jury composition resulted in a constitutional violation - as Appellant acknowledges:

"...but only a view of a defendant's individual jury venire can show whether such a general underrepresentation resulted in a constitutional violation in the defendant's own case." (Br. p. 22)

Appellant referred to Professor Stephenson who acknowledged that a computer error caused the jury-pool selection to be biased (89a, p. 15) and that the jury selection process was not representative across all ZIP codes. (89a, p. 16) If everything had been working correctly, 8 ½ % of the individual summoned would have been African-American (90a, p. 17) contrasted with his guess that only 4.17% were

African-Americans. (90a, p.18) He opined that if the jurors were summoned appropriately the obtained venire was 4 times more likely during this period of time. (90a, p. 20) [As noted, Mr. Bryant's trial commenced January 29, 2002. (5a) The error in computer programming was not cured until August of 2002. (110a)]

Appellant has posited a number of hypotheticals. These are irrelevant for 2 reasons: (1) The evidence is what it is - it cannot be displaced by hypotheticals and (2) Appellant's submission, except as buried in its Appendix, wholly ignores the testimony of Gail Van Timmeren, quoted *supra*, that she hand picked jurors. Her egregious violation of juror norms trumps not only Appellant's hypotheticals but the entire statistics discussion.

The People's brief urges that this case does not involve an Equal Protection challenge. (Br. p. 29) It states that "No one has ever suggested that Kent County engaged in a deliberate program to reduce the number of African-American jurors." (Id.) Appellee suggests that a benign indifference to a constitutional mandate equates to deliberate action. The People's quotation from Dr. Johnson about "voluntary ignorance" is right on the mark. (Br. p. 29) The attention of the Court is respectively directed to the discussion of Fair Cross-Section/Equal protection in the "Jury Managers' Toolbox", below. (In Appellee's answer to the Court's 3<sup>rd</sup> question.)

*Preservation of Error:* Appellant acknowledged that this error was preserved. (Br. p. 1) The error by the trial court was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States (*Duran et al.*) and resulted in a decision that was based on an unreasonable determination in light of the evidence presented in the trial court. . . . *Nevers v Killinger*, 169 F.3d 352, 360 (6th Cir. 1991) .<sup>1</sup> The proper inquiry for the

“unreasonable application” analysis is whether the state court decision was “objectively unreasonable” and not simply erroneous or incorrect. *Lordi v Ishee*, 384 F. 3d 189, 195 (6<sup>th</sup> Cir. 2004) For the reasons stated above the decision of the lower court was so contrary to the facts and law in issue, as to be an “unreasonable application”.

#### ANSWERS TO QUESTIONS PROPOUNDED BY THE COURT

Question 1: WHETHER, IN EVALUATING WHETHER A DISTINCTIVE GROUP HAS BEEN SUFFICIENTLY UNDERREPRESENTED UNDER *DUREN V MISSOURI*, 439 US 357; 99 SCT 664; 58 L ED 2D 579 (1979), SO AS TO VIOLATE THE SIXTH AMENDMENT'S FAIR CROSS-SECTION REQUIREMENT, COURTS MAY CHOOSE TO EXAMINE ONLY THE COMPOSITION OF THE DEFENDANT'S PARTICULAR JURY VENIRE, OR WHETHER COURTS MUST ALWAYS EXAMINE THE COMPOSITION OF BROADER POOLS OR ARRAYS OF PROSPECTIVE JURORS?

Appellee answers this question as follows:

This Court need not, and should not, examine the composition of broader pools or arrays of prospective jurors in order to decide this case. This is consistent with appellate law in general which seeks, whenever possible, to focus on the job at hand:

“...This court has stated its concern that cases are to be decided on the narrowest legal grounds available. *Penthouse International Ltd. v McAuliffe*, 610 F.2d 1353, 1362 (5<sup>th</sup> Cir. 1980); *Korioth v Briscoe*, 523 F.2d 1271, 1275 (5<sup>th</sup> Cir. 1975). This is especially important when dealing with constitutional questions as in this case....” *Shamloo v Mississippi*, 620 F2d 516, (5<sup>th</sup> Cir. 1980) at paragraph 36.

Justice Scalia referred to the “no broader-than-necessary requirement” in his concurring opinion in *Webster v Reproductive Health Services*, 492 US 490 (1988) at 537 “... we will not “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”

Furthermore, analyzing the racial composition of venires in Kent County over a period of time is impossible since Gail Van Timmeren testified that the Secretary of State does not identify race when submitting persons with a valid driver's license for the jury pool. (13a) Wayne Bentley said that would be illegal. (58a, p. 23) Consequently, when asked "Then how do you know whether or not you're getting enough minorities on a jury pool." Gail Van Timmeren responded: "We don't." (14a.)

The attention of the Court is respectively drawn to the language from p. 22 of Appellant's brief, quoted *supra*, where it acknowledges the specificity of Appellee's constitutional violation.

Question 2: WHETHER A DEFENDANT'S CLAIM OF SUCH UNDERREPRESENTATION MUST ALWAYS BE SUPPORTED BY HARD DATA, OR WHETHER STATISTICAL ESTIMATES ARE PERMISSIBLE AND, IF SO, UNDER WHAT CIRCUMSTANCES?

Appellee answers this question as follows:

Statistical estimates are permissible when physical evidence is lacking but statistical inferences are overwhelming; any test casting light on a fair decision is appropriate:

"(C)ourts should be free to use all the statistical tools available, including the absolute disparity figure, (etc)...in determining whether a group is fairly represented on a jury arrays." *State v Williams*, 525 NW2d 538, 542-543 (MN, 1994)

In *Alexander v Louisiana*, 405 US 625, 630 (1972) the Court said that "(t)his Court has never announced mathematical standards for the demonstration of 'systemic exclusion' of distinctive groups." See for example *State v Gibbs*, 758 A.2d 327, 778 N.E.2d 1253, 336 explaining that the choice of proper statistical method is fact driven.

In *Berguis v Smith*, 550 US \_\_\_\_ (1990) the US Supreme Court noted:

“In *People v Smith*, 463 Mich 199 (2000) this Court noted that no preferred method for measuring whether representation of a distinctive group in the jury pools is fair and reasonable, 203 that lower federal courts had applied three different methods . Since no single test is satisfactory it adopted a case by case approach allowing consideration of all three means of measuring under representation. 204 (*Berguis*, Slip opinion, pgs. 7,12)

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“As the Michigan Supreme Court correctly observed, see *supra*, at 6, neither *Duren* nor any other decision of this Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools.” (*Berguis*, id. p.11)

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“...(we) would have no cause to take sides today on the method or methods by which underrepresentation is appropriately measured.” (id. p. 12)

The following is from *People v Smith*, (2000) *supra*.

“...We thus consider all these approaches to measuring whether representation was fair and reasonable, and conclude that no individual method should be used exclusive of the others. Accordingly, we adopt a case-by--case approach. Provided that the parties proffer sufficient evidence, courts should consider the results of all the tests in determining whether representation was fair and reasonable.

In this case, defendant presented some evidence of a disparity between the number of jury-eligible African-Americans and the actual number of African-American prospective jurors selected to the Kent County Circuit Court jury pool list. However, defendant's statistical evidence failed to establish a legally significant disparity under either the absolute or comparative Page205 disparity tests. Nevertheless, rather than leaving the possibility of systematic exclusion unreviewed solely on the basis of defendant's failure to establish underrepresentation. we give the defendant the benefit of the doubt on underrepresentation and proceed to the third prong of the *Duren* analysis.”

“[Footnote3] In *Duren*, the Court specifically concluded that the petitioner had demonstrated that the underrepresentation was due to the operation of the exemption criteria. *Duren, supra* at 367. Therefore, *Duren* did not hold that the third prong was established solely on the basis of statistical proof; there was also proof of the cause of the underrepresentation. ”

Cavanagh, J (concurring).

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“As I have summarized, each of the methods of measuring whether representation of a distinctive group is fair and reasonable has its advantages and disadvantages. In any given case, the peculiar facts may render any method more or less appropriate, but in every case, the fair cross-section requirement is fundamental to the Sixth Amendment guarantee. Therefore, I would not purport to constrain Michigan , Page 222 courts to rigidly follow one method.

Instead, I believe that courts should analyze representation under all three tests and weigh the different results to ensure that a defendant's right to a jury drawn from a fair cross section of his community is not violated, yet avoiding the pitfalls of the individual tests. Other courts have also analyzed these claims under more than one method, or have acknowledged that such an analysis could be useful. See *Ramseur, supra* at 1231- 1232 (using all three analyses); *People v Sanders*, 51 Cal3d 471, 492-493; 797 P2d 561 (1990) (absolute and comparative disparity); *Jackman, supra* at 1247, n 5 (absolute disparity and standard-deviation-like analysis); *Hafen, supra* at 24 ("comparative disparity calculation might be a useful supplement to the absolute disparity calculation in some circumstances"). ” *Smith*, 221

The approach taken by the Court of Appeals in *People v Hubbard* is relevant to a determination whether unfair and unreasonable under-representation has been shown. Under this approach, a court may glance ahead at the evidence of systematic exclusion when deciding whether representation of the distinctive group is fair and reasonable. When the showing of underrepresentation is close, or none of the methods of analysis are particularly well-suited to a case, a court can consider the defendant's evidence of systematic exclusion. If a jury selection process appears *ex ante* likely to systematically exclude a distinctive group, that is, the system contains "non-benign" factors, a court may essentially give a defendant the benefit of the doubt on underrepresentation, even if the system *ex post* proves to work no systematic exclusion. I agree with *Hubbard* and other courts that have dealt with the shortcomings of each of the [Page 223] methods of analyzing representation in this manner. See *Ramseur, supra* at 1235; *Blaggi, supra* at 678; *Osorio, supra* at 978-979.” *Smith*, 222

Finally to this point, the attention of the Court is respectfully directed to the footnote from *Bryant*, 2010 quoting *Duran* that the second prong of the prima facie case was established by statistical presentation. (138a)

Question 3: WHETHER ANY UNDERREPRESENTATION OF AFRICAN-AMERICANS IN THE DEFENDANT'S VENIRE, OR IN KENT COUNTY JURY POOLS BETWEEN 2001 AND 2002, WAS THE RESULT OF SYSTEMATIC EXCLUSION UNDER THE THIRD PRONG OF DUREN V MISSOURI, SUPRA.

Appellee answers this question as follows:

“Systematic exclusion is exclusion ‘inherent in the particular jury-selection process utilized’”(Bryant 2010 137a)

A defendant does not need to show purposeful or intentional discrimination to make out a prima facie case of systematic exclusion. *Duren, supra* All a defendant has to show is that under-representation was systematic -- that is, was the result of the

system of jury selection that was used. In *Duren*, the fact that women were under-represented in jury arrays every week for nearly a year "manifestly indicated that the cause of the under-representation was systematic -- that is, inherent in the particular jury selection process utilized." *Duren*, 439 US at 366.

Under a Sixth Amendment "fair cross-section" claim, a defendant does not have to show that the distinctive group was intentionally excluded from jury service.<sup>5</sup> Rather, a defendant need only show that he or she was deprived of a jury array representing a fair cross-section of the community -- that he or she was deprived of a jury array containing representation of a distinctive group that was fair and reasonable in relation to its population in the community, which was the result of a systematic problem. A "systematic" problem under *Duren* means a generally recurring problem, one that can be traced to the system used. The requirements of *Duren* have been here satisfied. The Sixth Amendment is stricter because it forbids any substantial under-representation of minorities, regardless of motive. *US v Gelb*, 881 F2d 1155, 1161 (CA2, 1989)

The census evidence clearly demonstrated that the under-representation of Afro-Americans in Circuit Court jury arrays resulted from a systematic problem, meeting the third prong of *Duren* (*Bryant*, 2004 36a) and has persisted for at least one year. (45a, p.10) *Bryant*, 2010 held that there was evidence that the problem has "lasted for a significant duration...from late 2001 to July 2002 " and that "underrepresentation was inherent in the jury-selection process used in Kent County during the time that the computer glitch existed." (137a)

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<sup>5</sup> "While the equal protection clause of the Fourteenth Amendment prohibits underrepresentation of minorities in juries by reason of intentional discrimination, *Alston v Manson*, 791 F2d 255, 257 (CA 2, 1986), ... , the Sixth Amendment is stricter because it forbids any substantial underrepresentation of minorities, regardless of ... motive." *United States v Gelb*, 881 F2d 1155, 1161 (CA 2, 1989).

The prima facia evidence is more than sufficient to allow the Court to find that a prima facie case had been established under *Duren, supra*, which shifts the burden to the prosecutor to provide a compelling state justification for such a systematic exclusion. In *Hubbard* it was proven that the under-representation occurred for at least a year.

The evidence demonstrates deliberate and systematic exclusion (Gail VanTimmeren 11a-26a) ) as well as unintentional systematic exclusion (statistics and the failure to rigidly sanction non-responses to jury questionnaires. (47a, pgs.17,18) As noted above, a former member of the Jury Commission acknowledged that the law provides for a contempt citation for failure to return the jury questionnaire but the board had never followed through. (Id., p.19) When a letter to a prospective juror was returned as undeliverable, nothing was done. (Id., p. 20) Note the testimony of Dr. Stephenson that “The way the process was performing over the long run created a situation where African-Americans were going to be under-represented .” (91a, p. 21) Judge Kolenda pointed out that Professor Stephenson concluded that if his estimates reflect what actually happened in January-March 2002. “a systematic bias did exist then, in the selection of individuals summoned for jury duty” and this bias inevitably led to the under-representation’ of African-Americans in those months’ jury pools. “If his estimates were accurate, the disparity between 8.25% of all prospective jurors and the estimated fewer number of African-Americans mailed questionnaires was too great, he concluded, to be the product of chance, leaving bias as the explanation.” (112a, para. 34)

At the very least, the law supports a finding of systematic exclusion in Kent County: Note that *Berguis v Smith* arose out of Kent County, the comments of Judge

Kolenda regarding the historical problems in Kent County and the cases noted in footnote 2, *supra*. Attention is respectfully directed to the testimony of Gail Van Timmeren, *supra*, that "...in every single week, were (sic) not getting minorities in, and there was something wrong...."(51a, p. 33)

As early as 1974, in *Taylor v Louisiana*, 419 US 522, 419, 95 S Ct 692, 42 L42d 690 (1975) and perhaps before that, the US Supreme Court recognized the reality of "systematic exclusion".

"The Louisiana jury selection system does not disqualify women from jury service, but, in operation, its conceded systematic impact is that only a very few women, grossly disproportionate to the number of eligible women in the community, are called for jury service. In this case, no women were on the venire from which the petit jury was drawn. The issue we have, therefore, is whether a jury selection system which operates to exclude from jury service an identifiable class of citizens constituting 53% of eligible jurors in the community comports with the Sixth and Fourteenth Amendments.

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The real issue in this case is whether this underrepresentation is due to systematic exclusion of the group in the jury-selection process. On first consideration one might consider systematic exclusion to be synonymous with a jury selection process which engages in intentional discrimination. This notion, however, would be mistaken. A defendant need not show purposeful discrimination; he "need only show that the jury selection procedure systematically excludes distinctive groups in the community and thereby fails to be reasonable representative thereof." *Castanada v Partida*, 430 U.S. 482 (1977).

In a case suggestive of the Gail Van Timmeren method of choosing jurors, the evidence in *Carter v Jury Commissioners of Greene County*, 396 US 320 (1970) is striking:

"The clerk goes into each of the eleven beats or precincts annually, usually one time. Her trips out into the county for this purpose never consume a full day. At various places in the county she talks with persons she knows and secures suggested names. She is acquainted with a good many Negroes, but very few 'out in the county.' She does not know the reputation of most of the Negroes in the county. Because of her duties as clerk of the Circuit Court , 396 U.S. 320,

325 the names and reputations of Negroes most familiar to her are those who have been convicted of crime or have been 'in trouble.' She does not know any Negro ministers, does not seek names from any Negro or white churches or fraternal organizations. She obtains some names from the county's Negro deputy sheriff.

"The commission members also secure some names, but on a basis no more regular or formalized than the efforts of the clerk. The commissioners 'ask around,' each usually in the area of the county where he resides, and secure a few names, chiefly from white persons. Some of the names are obtained from public officials, substantially all of whom are white.

"One commissioner testified that he asked for names and that if people didn't give him names he could not submit them. He accepts pay for one day's work each year, stating that he does not have a lot of time to put on jury commission work. . . . He takes the word of those who recommend people, checks no further and sees no need to check further, considering that he is to rely on the judgment of others. He makes no inquiry or determination whether persons suggested can read or write . . . . Neither commissioners nor clerk have any social contacts with Negroes or belong to any of the same organizations. "*Carter v Jury Commissioners of Greene County*, 396 US 320 (1970) (In a suit challenging the informal manner of choosing jurors the Supreme Court affirmed the District Court's injunction forbidding systematic exclusion of Afro-American jurors).

In conclusion to this point, a comment published by the National Center for State Courts, 2010 as *Jury Managers' Toolbox* is instructive:

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#### Systematic Exclusion

The final prong of the *Duren* test is that under-representation of the distinctive group is the result of intentional discrimination (Equal Protection) or systematic exclusion (Sixth Amendment). Systematic exclusion does not have to be intentional, but merely an inherent result of the jury selection process. In *Duren*, the Supreme Court found that the policy of offering automatic exemptions to women was systematic exclusion insofar that it was inherent in the jury selection process. More recent examples of systematic exclusion are often related to the automation used in the (4) jury selection process. In *US v Osorio* (7) for example, the length of the database field for the prospective juror's city of residence in the master jury list was truncated, causing the system to misread the eighth character as the jurors' status. As a result, all of the records for individuals living in Hartford were mistakenly excluded from jury service because the system interpreted the "lid" in Hartford to mean "deceased." At that time, the largest single concentration of Hispanics in the state resided in the city of Hartford. In another example, during a routine upgrade to the jury automation system in Kent County, Michigan, the software was mistakenly programmed to randomly select names from the first 125,000

records on the master jury list rather than from the entire list, which was more than 500,000 records in length. (8) The list was sorted alphabetically by zip code and the largest proportion of African-Americans in Kent County resided in the sequentially higher zip codes.

Non-systematic exclusion, in contrast, is the under-representation of distinctive groups in the jury pool due to factors beyond the control of the Court. Common examples of non-systematic exclusion include disproportionately low rates of voter registration by minorities that result in under-representation by those groups on the master jury list and subsequently in the jury pool. (9) Courts have no authority to compel members of those groups to register to vote. Another factor commonly related to under-representation of minorities is undeliverable rates, which are strongly correlated with lower socioeconomic status and, in turn, correlated with minority status. Courts similarly have no authority to compel individuals to provide the US Postal Service with a forwarding address or to require the agencies that provide the source files for the master jury list to improve their record maintenance procedures. Failure-to-appear rates and excusal rates are likewise highly correlated with socioeconomic status and have historically been considered forms of non systematic exclusion.

Nevertheless, the question of whether the impact of socioeconomic factors on the demographic composition of the jury pool could support a fair cross section claim is still unsettled. Some courts in recent years have expanded the scope of systematic exclusion to include factors that may fall outside of the court's ability to prevent, but for which reasonably effective and cost-efficient remedies exist. One of the earliest examples was *People v Wheeler*, (10) in which the Supreme Court of California found that exclusive reliance on the voter registration list as the sole source of names for the master jury list systematically excluded Blacks and Hispanics from the jury pool. Technological advances had made it possible for courts to merge multiple source lists to create a more inclusive and representative master jury list, making the argument that low voter registration rates by African-Americans and Hispanics no longer justifiable. In *People v Harris*, the California Supreme Court explicitly warned against under-representation “stemming from negligence or inertia” in the jury selection process, citing cases that recognize that “official compilers of jury lists may drift into discrimination by not taking affirmative action to prevent it. II” (This is acknowledged by Appellant. (Br. p. 24)

In *U.S. v Green*, (12) the U.S. District Court for the Eastern District of Massachusetts ruled that the court's failure to take reasonable steps to address undeliverable and failure-to-appear rates for jurors living in predominately minority zip codes violated the federal Jury Selection and Service Act. The court proposed over-sampling from predominantly minority zip codes as a remedy in that case. Order overturned because it unlawfully supplemented the Jury Plan.

The most recent discussion of this issue occurred in *Berghuis v Smith*, *supra*.

The federal Sixth Circuit Court of Appeals had ruled that the trial court's excusal policy, which "allowed prospective jurors to essentially 'opt out' of jury service if jury duty would constitute a hardship based on child care concerns, transportation issues, or the inability to take time from work" was a systematic exclusion that produced unacceptable under-representation in the jury pool." As the Sixth Circuit stated, "the Sixth Amendment is concerned with social or economic factors when the particular system of selecting jurors makes such factors relevant to who is placed on the qualifying list and who is ultimately called to or excused from service on a venire panel." Upon review, the US Supreme Court concluded that there was insufficient evidence that the trial court's excusal policy caused the under-representation of African-Americans and thus declined to address the question directly. [The problem of undeliverables was not addressed by the Jury board in Mr. Bryant's case. (49a, p. 25) Note: Of the 183 jurors summoned only 132 appeared. (19a)]

#### An Uneasy Relationship between the Second and Third Prongs of Duren

The *Duren* test requires that all three elements be satisfied to find a violation of the fair cross section requirement. Yet a close examination of contemporary cases reveals an ongoing ambiguity about whether the ultimate objective of the requirement is a more representative jury pool or a non-exclusionary jury system. In some cases, courts have determined that the fair cross section requirement is satisfied provided that the process of summoning and qualifying jurors does not systematically exclude distinctive groups. Other courts have found fair cross section violations in cases with comparatively low levels of disparity if there is any evidence of systematic exclusion." It remains to be seen whether the more recent expansion of the definition of systematic exclusion will relieve or further exacerbate this tension. Nevertheless, an effective jury system will ensure that jury operations are free of systematic exclusions and that the resulting jury pool is a reasonable reflection of community demographic characteristics.

(7) *U.S. v Osorio*, 801 F Supp. 966 (D. Conn 1992)

(8) G. Thomas Munsterman, *Jury Management Study for Kent County, Michigan* (May 6, 2003)

(9) See, e.g., *U.S. v Biaggi*, 909 F2d 662 (2nd Cir. 1990)

(10) *People v Wheeler*, 503 P.2d 748 (Cal. 1978).

(11) *People v Harris*, 36 Cal 3d 36, 59 =8 (1984)

(12) *U.S. v Green*, 389 F. Supp. 2d 29 (D. Mass. 2005)"

(Some footnotes omitted.) www

ncsconlineorg/D\_Reasearch/cjs/jmt\_primer.pdf

That the nature of the process is a factor to be considered was noted in

*Gardner v Kapture*, 261 F Supp. 2d 793 (E.D. Mich 2003)

## CONCLUSION AND RELIEF

Whether the exclusion of African-Americans was intentional or not is of no consequence, because the standard is not one of intentional discrimination but whether the under-representation results from a systematic problem -- one caused by the system employed in selecting jurors. A prima facie case has been established under *Duren*, which shifts the burden to the prosecutor to provide a compelling state justification for such a systematic exclusion. Appellee has established a prima facie case of systematic exclusion under *Duren* which has not been rebutted beyond a reasonable doubt. The claim that the computer error was unintentional is irrelevant under a VI Amendment claim. *US v Gelb, supra*. It comes down to the fact that only 1 African-American juror was observed of the 45 people on the array. Consequently, it may be concluded that (1) Afro-Americans are a distinctive group under *Duren*, (2) were systematically excluded from Circuit Court jury service, and (3) that their representation on Circuit Court arrays was not fair and reasonable but was a substantial under-representation in relation to their population in the community.

“In fact, we cannot conceive of any significant state interest that could possibly justify the jury-selection process used in Kent County during the time the computer glitch systematically excluded African-Americans from jury venires.” (*Bryant* 2010 138a)

The decision of the Court of Appeals should be affirmed. Mr. Bryant is entitled to a new trial “... before an impartial jury that is drawn from a fair cross-section of the community...” (*Id.*, 139a)

Respectfully submitted,

  
Arthur James Rubiner  
Attorney for Appellee

Dated: September 15, 2011

1 . 28 USC 2254(d)(I): An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.